

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 13, 2005 Session

ANN S. WING v. KATHY PARCHMAN

**Appeal from the Circuit Court for Davidson County
No. 04C-719 Marietta Shipley, Judge**

No. M2005-00273-COA-R3-CV - Filed on April 11, 2006

In this appeal from Circuit Court in Davidson County, the daughter by a previous marriage of a deceased ex-husband appeals the imposition of a constructive trust upon monies received from the ex-husband's pension death benefit. The trial court held that the ex-husband's designation of the daughter as a death beneficiary was in contravention of the court's prior divorce decree and order regarding personal property division. For the reasons and under the authorities cited herein, we affirm the trial court in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Markley Runyon Gill, Erin, Tennessee, for the appellant, Kathy Parchman.

Clark Lee Shaw and Martha Child, Nashville, Tennessee, for the appellee, Ann S. Wing.

OPINION

This case was before this court by previous appeal. We found therein:

Mr. and Mrs. Wing were divorced by the court on December 23, 1996. The decree was entered on December 26, 1996 and contained the following paragraph:

It is FURTHER ORDERED, ADJUDGED AND DECREED that wife's pendente lite support shall continue until such time as Husband actually enters retirement. Once Husband is retired and receiving no other funds from Metropolitan Government of Nashville, Wife's pendente lite support shall be reduced to \$230 per week.

The court also set another hearing at which all the other issues would be resolved. On June 4, 1997 the court entered a memorandum and order dividing the marital property. The Memorandum recited that "The court originally granted the divorce on December 23, 1996 to Ms. Wing and awarded Ms. Wing alimony in the amount

of \$260 per week until Mr. Wing retired. Thereafter the amount would be \$230 per week.” [FN1]

FN1. Mrs. Wing appealed the final judgment of the trial court, but the appellate court dismissed the appeal when it learned that Mr. Wing had died in June of 1998. We do not think the appeal and subsequent dismissal has any effect on the issue of Mr. Wing’s pension.

On the same day, Mr. Wing retired and elected to receive a definite amount in 120 monthly payments. He designated his daughter, Kathy Parchman, as the person to receive payments in the event of his death within the 120 month period.

It is not clear what happened next, but on December 16, 1997 the court entered an order responding to Mrs. Wing’s request for various actions. The critical parts of the order for present purposes are (1) the denial of Mrs. Wing’s motion for one-half of the pension, and (2) the following provision with respect to that subject:

IT IS FURTHER ORDERED, that the Complainant will receive \$230.00 per week, or \$996.67 per month, as her share of Defendant’s Metropolitan Government Pension Plan. This amount represents a division of property in lieu of an award of ongoing spousal support to Complainant. Mr. Wing died on June 3, 1998 and a suggestion of death was filed with the court on August 5, 1998. On December 14, 1998, Mrs. Wing filed a motion under Tenn. R. Civ. P. 60 to alter the judgment entered on December 26, 1996. The motion stated that because of oversight, omission, excusable neglect, mistake, or inadvertence the order awarded her alimony instead of a part of Mr. Wing’s pension as her share of the marital property. [FN2] Ms. Parchman, as the personal representative of the estate of James Wing, made a limited appearance to contest the jurisdiction of the court to grant the Rule 60 relief. Mrs. Wing then moved to add the Metropolitan Government of Nashville and Davidson County (Metro) and Ms. Parchman as party defendants. Both Metro and Ms. Parchman objected to the joinder. The court originally denied the joinder and substituted Mr. Wing’s estate as the party in interest.

FN2. The motion apparently overlooked the modification made in the December 16, 1997 order.

Wing v. Estate of Wing, et al., 2003 WL 1872647, *1 (Tenn.Ct.App.April 14, 2003).

After this opinion issued, the divorce case was finally dismissed against the estate, the Metropolitan Government and Ms. Parchman. Instead, Ms. Wing filed a separate complaint averring that the pension benefit portion, to which Ms. Wing was completely vested as of the December decree, was equitably converted to her personal property by that decree. She sought the imposition of a constructive trust on those monies held by Ms. Parchman as a result of the wrongful designation.

Ms. Parchman answered admitting the majority of the allegations of the complaint but denying that the designation warranted the imposition of a constructive trust. After a scheduling

conference the trial court determined that no material issues of fact existed, and on September 15, 2004, counsel for Ms. Wing filed her motion for judgment on the pleadings. After briefing and argument, the trial court granted Ms. Wing's motion:

Faced with this seemingly daunting task of a post-death change or clarification, the court has tried every which way to find a legal way to carry out the court's intent in its June, 1997 and December 1997 order. It is now seven and one half years later. Likely this will not be the end. By the time this case makes its way through the Court of Appeals again, Ms. Wing may not see the end. Fortunately she began receiving Social Security benefits, or she would be living on \$430 per month.

Obviously, it would have been neater if the court had ordered Mr. Wing not only to send Ms. Wing \$997 out of his pension monies as a division of property, but also to make his wife the beneficiary of at least \$997 of any death benefit, he could sign up for. The court did not do so. Nobody dealt with the death benefit other than Mr. Wing, so thus one must look at the intent of the court's order.

The court finds that this error or oversight by the court or Ms. Wing's attorney is not fatal. The court finds that now that Ms. Parchman has been served, the same findings and legal conclusions as were found in the May 16, 2001 Memorandum Opinion and Order in the underlying case are valid today. The legal argument in that memorandum was stated. So the central question is "Did Mr. Wing defeat the intent of the court's orders of June 4, 1997 and December 16, 1997 by not designating his exwife as beneficiary of his 10 year payout pension plan?" The memorandum opinion is incorporated by reference into this opinion. As stated in that memorandum, the court finds that the intent of the court was to divide the retirement benefits or pension plan, not equally but in an amount that would equalize their incomes. She had a vested interest in the retirement benefits by virtue of the divorce decree. She could count on those pension benefits so long as they would last. Of course she thought they would last for his and therefore her lifetime, but as stated, nobody had directed him to fill out any certain plan.

...

As asserted in the plaintiff's brief, Ms. Parchman has also been frustrated by these long standing legal proceedings. She would have received these funds since 1998, at least about \$400 per month. She has chosen to place all the funds in a separate interest bearing account. The court does consider that she has effectively created a constructive trust for Ms. Wing.

As Ms. Parchman has now been served, she will be ordered to pay over to Ms. Wing, all accumulated amounts of the \$997 per month to date as well as payments in the future she receive from Metro up to the ending date of June 4, 2007. Interest will be paid to Ms. Wing in the amount of interest percentage, which was earned in that account, not the statutory interest rate.

Ms. Parchman appeals from this order arguing in essence that since the original order which divided the marital property did not designate a specific plan or fund from which Mr. Wing's \$997 monthly payment was to be made, the acceptance by Ms. Parchman of the monthly benefit in its entirety could not amount to such unjust enrichment as to entitle Ms. Wing to the imposition of a constructive trust.

The court is unpersuaded. Our statutes and precedents plainly provide that the pension involved in this suit was marital property subject to division. *See* Tenn. Code Ann. § 36-4-121(b)(1)-(B); *see also Cohen v. Cohen*, 937 S.W.2d 823, 830 (Tenn.1996). The divorce decree, as related in our previous opinion and as properly admitted by the defendant, provided that the \$997 monthly payment was an identified share of Mr. Wing's monthly pension benefit. As a result of this decree, Ms. Wing at the very least had an equitable claim to her marital share of the monthly benefit. As a result, there is no difference between the case at bar and that class of cases which holds that an order requiring the maintenance of an individual's beneficiary status under a policy of insurance creates in that individual an equitable interest in that policy. *See Holt v. Holt*, 995 S.W.2d 68, 72 (Tenn.1999); *see also Goodrich v. Mass. Mutual Life Ins. Co.*, 240 S.W.2d 263 at 270 (Tenn.Ct.App.1951). "Tennessee courts have utilized equitable grounds to protect persons legally mandated to be listed as beneficiary of a life insurance policy." *Holt*, 995 S.W.2d at 72. It has long been held in this jurisdiction that:

A constructive trust is one that arises contrary to intention and in invitum, against one who by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal title to property which he ought not, in equity and good conscience hold and enjoy. *Sanders v. Forcum-Lannom, Inc.* (1972), 225 Tenn. 637, 475 S.W.2d 172.

Livesay v. Keaton, 611 S.W.2d 581, 584 (Tenn.Ct.App.1980).

Nowhere in this record, the briefs or otherwise does Ms. Parchman argue that she is somehow a bona fide purchaser of the pension benefit. In fact, she is no more than a donee beneficiary of the gratuitous assignment from her deceased father. In this respect, the assignee obtains only that title which the assignor originally had. *See Kivett v. Mayes*, 354 S.W.2d 492-94 (Tenn.Ct.App.1961). This gratuitous assignment, if it vests Ms. Parchman with legal title at all, vests at best a legal title which she "ought not in equity and in good conscience enjoy" beyond her father's share. *See Livesay*, 611 S.W.2d at 584; *see also Sanders*, 475 S.W.2d 172. The order of the trial court imposing the constructive trust is therefore in all respects affirmed. Costs of appeal are taxed against Ms. Parchman, for which execution may issue if necessary.

WILLIAM B. CAIN, JUDGE